BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

AIMEE NELSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,049,684
USD 305	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY	)	
OF AMERICA	)	
Insurance Carrier	)	

ORDER

Claimant appeals the November 2, 2010, preliminary hearing Order of Administrative Law Judge John D. Clark (ALJ). Claimant was denied additional medical treatment after the ALJ determined that claimant had reached maximum medical improvement (MMI) based on the medical opinions of board certified neurological surgeon Paul S. Stein, M.D., and orthopedic surgeon Kenneth A. Jansson, M.D.

Claimant appeared by her attorney, Roger A. Riedmiller of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Vincent A. Burnett of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held November 2, 2010, with attachments, and the documents filed of record in this matter.

ISSUES

1. Did the ALJ err in refusing claimant additional medical treatment? Claimant contends that the ALJ failed to follow the statutory requirements of K.S.A. 2009 Supp. 44-510h(b)(1) by not ordering claimant to receive added medical treatment for the injuries suffered to her left knee, ankle and foot, and her low

back. Respondent contends that claimant had been found to be at MMI by more than one doctor and claimant's actions are nothing more than doctor shopping.

2. Does the Board have jurisdiction over this appeal? Respondent contends that the ALJ has the jurisdiction to determine a need for ongoing medical treatment at a preliminary hearing and the Board does not have the jurisdiction to review that order on an appeal from a preliminary hearing. Claimant contends the ALJ exceeded his jurisdiction by denying medical treatment and the Board has jurisdiction under K.S.A. 2009 Supp. 44-551 to consider that issue on appeal.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should remain in full force and effect and the appeal of claimant in this matter should be dismissed.

Claimant worked as a paraprofessional for respondent, when, on September 21, 2009, she sustained an injury to her left knee and foot. Claimant was referred to Dr. Jansson for treatment, ultimately undergoing knee surgery on January 14, 2010, including a lateral release, chondroplasty and removal of loose body, all performed arthroscopically. Claimant was returned to light duty on January 28, 2010, with restrictions.

However, on March 24, 2010, claimant suffered a second accident when a student ran into her left leg. Claimant suffered pain in her left lower extremity and low back after this incident. Claimant was returned to Dr. Jansson for treatment. Dr. Jansson determined that claimant had sustained only an aggravation of the original knee injury. Claimant was found to be at MMI on April 28, 2010, with no specific restrictions. Dr. Jansson did caution claimant that she needed to lose weight, as her 5-foot-5-inch frame was unable to accommodate her 270-pound body. Dr. Jansson assessed claimant a 2 percent functional impairment to the left lower extremity from the work-related accidents. Dr. Jansson opined that claimant's ongoing achiness was related to the already present arthrosis in her knee and to her weight.

After her release by Dr. Jansson, claimant was referred to pain management specialist George G. Fluter, M.D., for an evaluation. Dr. Fluter determined that claimant needed additional evaluations and treatment, recommending pain and muscle relaxant medications, x-rays and an MRI scan of the low back, additional testing on claimant's left lower extremity, physical therapy and a possible neurosurgical and/or orthopedic consultation.

This matter was scheduled for a preliminary hearing stemming from claimant's request for added medical treatment. However, the parties reached an agreement on May 13, 2010, which resulted in an Order from the ALJ requiring respondent to provide claimant with a list of three physicians from which claimant was to choose

an authorized treating physician for her injuries. Claimant chose Dr. Stein from the list. A referral letter by respondent's attorney to Dr. Stein dated June 11, 2010, instructed the doctor to perform the examination, with the doctor to address all body parts and to treat claimant as a new patient.

Dr. Stein examined claimant on July 22, 2010. Claimant contends that Dr. Stein approached this examination as an IME with the referral from respondent. However, Dr. Stein, in his report under "Summary and Conclusions", stated that he was apparently authorized to treat where indicated, with a request for a causation opinion as well. Dr. Stein went on to recommend an MRI of the left foot, which was reported as normal. Claimant was also referred for an MRI of the low back, again with the result being normal. Dr. Stein determined that, with claimant's ongoing complaints in her left knee, a referral was appropriate. Claimant was then sent to Bernard T. Poole, M.D., on August 16, 2010. Dr. Poole was provided with medical reports from claimant's past injuries, including x-rays and MRI reports on the left lower extremity. He found claimant to have a grade 4 chondromalacia of the patella in the left knee and assessed her a 10 percent permanent partial disability of the left lower limb. He did agree that the accident on September 21, 2009, aggravated or exacerbated claimant's preexisting knee condition. Dr. Poole also indicated that no further surgery was indicated at the time of the examination, but that without significant weight loss, claimant's knee would continue to worsen quickly. Without "drastic weight reduction", claimant's knee would progress to severe patellofemoral degenerative arthritis with further surgery in the future, including a total joint replacement.[1]

This matter proceeded to preliminary hearing at claimant's request on November 2, 2010. At that time, the ALJ determined that claimant had reached MMI, citing the opinion of Dr. Stein, and additional medical treatment was denied.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

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[1] P.H. Trans., Resp. Ex. 2.

[2] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

K.S.A. 2009 Supp. 44-510h(a)(b) states:

> (a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.
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> (b) (1) If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider.
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> (2) Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of $500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

Claimant contends that the ALJ exceeded his jurisdiction in denying additional medical treatment. Claimant contends that K.S.A. 2009 Supp. 44-510h mandates that the respondent provide a list of three physicians and a claimant has the right to utilize all three from the list. The ALJ determined that claimant, after choosing Dr. Stein from the list, was at MMI and in need of no additional treatment. Respondent contends that the ALJ has the jurisdiction to make such a determination and the Board does not have the jurisdiction on appeal from a preliminary hearing order to consider that ruling.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues

[4] K.S.A. 2009 Supp. 44-501(a).

where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[5]

The Board is limited under K.S.A. 2009 Supp. 44-551 to reviewing issues presented to and decided by an administrative law judge.

The ALJ made a determination regarding claimant's ongoing need for medical treatment. This decision was based on medical reports from examining and authorized treating physicians. This is an administrative law judge's job when hearing and deciding issues at a preliminary hearing. This type of decision is well within the jurisdiction of an administrative law judge at a preliminary hearing.

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[6]

Claimant contends that the ALJ exceeded his jurisdiction when he denied claimant additional medical treatment. This Board Member understands claimant's frustration. However, the Board is limited in its review at this stage of these proceedings. The determination regarding the need for medical treatment is an administrative law judge's job under K.S.A. 44-534a. Therefore, the ALJ did not exceed his jurisdiction in making that ruling, and this Board Member can go no farther than to dismiss this appeal.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this

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[5] K.S.A. 44-534a(a)(2).

[6] *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

[7] K.S.A. 44-534a.

review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The ALJ did not exceed his jurisdiction when determining that claimant had reached MMI and that no additional medical treatment was needed in this case at this time. Therefore, the appeal of claimant from the preliminary hearing Order of November 2, 2010, is dismissed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated November 2, 2010, remains in full force and effect and the appeal of claimant is dismissed.

IT IS SO ORDERED.

Dated this ____ day of January, 2011.

HONORABLE GARY M. KORTE

c: Roger A. Riedmiller, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge